No. 97-313 (4)

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IN THE

Supreme Court of the United States

October Term, 1997

MRS. IDA GUTHMANN, deceased, STEPHEN F. GUTHMANN, ESQ., personally and as administrator as of 24 September 1992,

Petitioners,

against

CROUSE IRVING MEMORIAL HOSPITAL, ESTHER MURROCK-NURSE PRACTITIONER, DR. SCOTT GINGOLD, DR. P.A. GELNAR, DR. LUCIANO M. MODESTI, NEUROLOGICAL SURGERY GROUP OF PHYSICIANS, DR. JAMES B. TURCHIK, DR. JOSEPH G. BATTAGLIA, DR. GEORGE E. MITCHELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there exist independent and adequate state grounds under New York State law to support the trial court's dismissal of the plaintiff's medical malpractice action based on a lack of prima facie evidence?

2. Whether the plaintiff should now be permitted, for the first time on appeal, to raise new issues involving federal statutes that: were not alleged in the plaintiff's pleadings; were not considered by the trial court; and were not the basis for the New York courts' prior appellate rulings in this action?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF FACTS

At issue in this litigation is the medical care and treatment rendered to eighty one year old Ida Guthmann from August 21, 1991 to her death on September 4, 1991.[1]

Appellant Stephen F. Guthmann's mother, Ida Guthmann, suffered a left front temporal subdural hematoma with significant mass effect sometime prior to her presentation at the Crouse Irving Memorial Emergency Room on September 10, 1989. She arrived unconscious with a prior medical history significant for progressive dementia, prior myocardial infarction, paroxysmal atrial fibrillation, high blood pressure, sarcoid, osteoarthritis, and latent diabetes. A CT scan of the patient's brain revealed a large chronic as well as acute left subdural hematoma with significant displacement of both ventricles across the mid-line and early transtentorial herniation. Dr. Modesti, a neurosurgeon, evaluated the patient and performed an emergency craniotomy to evacuate the hematoma.

Despite the successful evacation of the subdural hematoma, the patient remained comatose in a chronic vegetative state up to the time of her death on September 4, 1991. Throughout her extended course of treatment at Crouse Irving Memorial Hospital, Mrs. Guthmann was provided nourishment through a feeding tube. She had a tracheostomy because of prolonged intubation. She had an indwelling catheter for bladder control and enemas for bowel evacuation.

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[1] Plaintiff voluntarily notified the lower court and the parties that he was limiting his allegations to the time period of August 27, 1991, through September 4, 1991, and that he was withdrawing any claims outside that time period.

In August of 1991, Mrs. Guthmann developed a fever, which was initially diagnosed as a consequence of a urinary tract infection. Her fever improved for several days while she was treated with Flucanazole. Thereafter, her fever returned.

A chest x-ray on August 20, 1991 was interpreted as negative for signs of pneumonia. On August 27, 1991, Dr. Modesti requested an evaluation and consultation by Dr. Turchik, an infectious disease specialist. A ventilation perfusion scan on August 27, 1996, showed a high probability of pulmonary emboli. On the same date, Dr. Modesti requested an evaluation and consultation with Dr. Battaglia, a cardiologist, who recommended anticoagulant therapy for pulmonary emboli. An additional chest x-ray on August 27, 1991, was interpreted as negative for signs of pneumonia. The patient's condition improved on anticoagulant therapy with better breath sounds, better oxygen saturation, and she defervesced.

On September 1, 1991, she again spiked a fever. Additional chest x-rays on September 1 and September 3, 1991 were interpreted as negative for signs of pneumonia. Despite continued respiratory care and administration of oxygen by face mask, Mrs. Guthmann's condition continued to deteriorate.

On September 3, 1991, Dr. Modesti had a long discussion with Stephen Guthmann about his mother's condition and the poor prognosis for any type of recovery. Dr. Modesti advised Mr. Guthmann that, in his professional medical opinion, heroic resuscitative measures like intubation would be medically futile. Dr. Turchik and Dr. Battaglia agreed with Dr. Modesti's evaluation and recommendation.

Mr. Guthmann disagreed with Dr. Modesti's analysis and recommendation and insisted that all heroic measures be taken

to keep his mother alive. On September 3, 1991, Dr. Modesti advised Mr. Guthmann of his desire to withdraw from the case and that he would request that an alternate physician assume the care of Mrs. Guthmann. Dr. Modesti notified the hospital administration that he wished to withdraw from the case.

Unfortunately, in the early morning hours of September 4, 1991, Mrs. Guthmann was found unresponsive with no spontaneous respirations. An emergency cardiac code was called with the administration of cardiopulmonary resuscitation, atropine, epinephrine, electric defibrillation of the heart and oxygen by mask. Despite the efforts of the cardiac code team, Mrs. Guthmann expired at 6:20 a.m. Dr. Modesti was notified of Mrs. Guthmann's death and responded to the hospital.

PROCEDURAL HISTORY

The Plaintiff commenced this action by the service of a summons and complaint dated August 10, 1992. The plaintiff's complaint contains allegations of medical malpractice, homicide, abandonment, conspiracy to commit homicide, falsification of medical records, conspiracy to falsify records, fraud, and breach of implied contract against the medical personnel named in the complaint.[2]

Defendants Dr. Luciano M. Modesti and the Neurological Surgery Group of Physicians interposed an answer denying the plaintiff's allegations. Dr. Modesti is the neurosurgeon that initially performed an emergency craniotomy and evacuation of a subdural hematoma on Mrs. Guthmann upon her initial

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[2] Plaintiff has voluntarily limited the issues in this matter to the alleged medical malpractice and alleged abandonment during the time period of August 21, 1991 thorough September 4, 1991.

presentation in 1989 (R 179). Thereafter, he was designated Mrs. Guthmann's attending physician. The only claim against Neurological Surgery Group of Physicians is that they are vicariously liable for the alleged acts and/or omissions of Dr. Modesti.

In June of 1995, almost three years after the commencement of the action, Dr. Turchik, Dr. Battaglia, and Dr. Mitchell moved for summary judgment. In support of their motions, the moving defendants submitted affidavits from three board certified medical experts from each of their respective fields. Dr. Mitchell Brodey, a specialist in infectious diseases, stated in his affidavit that the care and treatment of Mrs. Guthmann by Dr. Turchik was entirely consistent with accepted medical practice. Dr. James Potts, a specialist in cardiology, stated in his affidavit "that the care and treatment by Dr. Joseph Battaglia, and for that matter the other physicians, was entirely consistent with good and accepted medical practice." Dr. Alan Foster, a specialist in diagnostic radiology, stated in his affidavit that the care and treatment rendered by Dr. George Mitchell was consistent with accepted standards of medical care.

After a number of adjournments of the motion at the plaintiff's request, on September 5, 1995, Mr. Guthmann cross-moved for partial summary judgment against all defendants on the abandonment cause of action. Plaintiff did not submit any expert affidavits in support of his motion. Instead, he attempted to rely on three unsigned and unsworn reports from some unidentified physicians, along with deposition testimony from the medical examiner, an affidavit from a lay witness, and his own affidavit.

On September 21, 1995, defendants Crouse Irving Memorial Hospital, Esther Murrock, Dr. Scott Gingold, and Dr. P.A.

Gelnar (hereinafter Hospital defendants) moved for summary judgment. The Hospital defendants submitted expert affidavits from an emergency room physician and a nurse practitioner in support of their motion.

On September 27, 1995, defendants Dr. Luciano M. Modesti and Neurological Surgery Group of Physicians moved for summary judgment. In support of their motion, Dr. Modesti and N.S.G.P. submitted the affidavit of David G. Storrs, M.D., a neurosurgeon. Based on his review of the records and pleadings, Dr. Storrs stated in his affidavit that Dr. Modesti properly deferred to consultants in the field of infectious diseases, cardiology, and radiology for diagnosis and treatment and properly instituted those recommendations. Additionally, Dr. Storrs stated that, based on his review of the medical records, Dr. Modesti never abandoned or in any way refused to treat Mrs. Guthmann. In his expert opinion, Dr. Modesti's care and treatment of Mrs. Guthmann constituted good and accepted medical practice.

On October 27, 1995, the Court heard oral argument on the motions. Following oral argument, the Honorable Leo F. Hayes, J.S.C. granted the defendants' motions. The plaintiff's cross-motion was denied. An order was entered on November 16, 1995, along with a judgment.

Subsequent to the motion, the plaintiff requested an additional time period to attempt to obtain expert affidavits. Justice Hayes denied the plaintiff's informal request for additional time to submit expert affidavits, but advised the plaintiff "[i]f you wish to make a formal motion requesting additional time for this (sic) submission of experts' affidavits for consideration by the court, that is, of course, your prerogative to do so."

On December 11, 1995, the plaintiff filed a Notice of Appeal from the November 16, 1995 Order and Judgment.

On December 28, 1995, plaintiff moved the trial court for renewal and attempted to submit to the Court an affidavit of a physician signed after the original motion based on an argument that the affidavit constituted "newly discovered evidence." The defendants opposed the motion on procedural and substantive grounds.

On March 15, 1996, the Court heard oral argument and, then, denied the plaintiff's motion to renew. Thereafter, on April 4, 1996, the Court signed the order denying the plaintiff's motion to renew in its entirety. Defendants served and filed judgments on April 11, April 25, and May 3, 1996.

Plaintiff filed an appeal from the April 4, 1996 Order and each of the three judgments. On appeal, the plaintiff attempted, for the first time, to allege that several federal statutes applied to this action, including the Emergency Medical Treatment and Active Labor Act, 42 U.S. C. §1395dd, the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act, 42 U.S.C. §12101. On December 30, 1996, the Appellate Division of the Fourth Department affirmed the dismissal of the plaintiff's complaint.

The plaintiff petitioned the Appellate Division of the Fourth Department for leave to appeal to the New York Court of Appeals and, in the alternative, for reargument. On March 14, 1997, the Appellate Division of the Fourth Department denied the plaintiff's motion.

On April 1, 1997, the plaintiff filed a petition for certiorari to the New York Court of Appeals. On June 17, 1997, the New York Court of Appeals denied the plaintiff's petition.

Now, the plaintiff petitions the Supreme Court of the United States for a writ of certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. Petitioners Federal Claims were First Raised on Appeal.

The plaintiff's original pleadings do not include any reference to the federal statutes cited by the plaintiff. At no time did the plaintiff seek leave to amend his pleadings to include the federal claims. The plaintiff raised the federal claims for the first time on appeal. Under New York law, an appellant is precluded from raising on appeal an issue that was not raised before the lower court. *Telaro v. Telaro*, 25 N.Y.2d 433, 438 (1969); *Angel Fabrics, Ltd. v. Cravat Pierre, Ltd*, 51 A.D.2d 951 (1st Dept. 1976); *Berger v. Fete Cab Corp.*, 57 A.D.2d 784 (1st Dept. 1977); and *Holmes v. Utica Mutual Insurance Co.*, 92 A.D.2d 1045 (3d Dept. 1983). Thus, the plaintiff is precluded from raising the federal claims for the first time on appeal.

2. There are Independent and Adequate Grounds Under New York State Law to Support the Trial Court's Dismissal of the Plaintiff's Medical Malpractice Action Based on a Lack of Prima Facie Evidence.

As discussed above, New York law precluded the plaintiff from raising the federal claims for the first time on appeal. The appellate decisions affirming the dismissal of the plaintiff's

complaint were based solely on New York law: the failure to produce expert evidence in admissible form to establish a prima facie case of medical malpractice. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 327 (1986). There is no evidence or any indication that the appellate decisions were based in any part on any of the federal statutes cited by the plaintiff. The decisions do not discuss the federal statutes. The decisions do not cite to the federal statutes or federal case law. To the contrary, under established New York case law, the plaintiff was precluded from raising new issues on appeal and, therefore, the previous appellate decisions must be presumed to be based on the findings of the lower court, which were based solely on New York law.

It is well established that where there is an independent and adequate basis for the state court's decision below, the Supreme Court will not disturb the state court decision below. *Illinois v. Rodriguez,* 110 S.Ct. 2793 (1990). In this action, there are independent and adequate grounds to support the New York trial court's dismissal of the plaintiff's medical malpractice action because the plaintiff failed to establish a prima facie case under New York law. Thus, the trial court's decision should not be disturbed.

3. The Supreme Court Lacks Jurisdiction to Review this Matter.

The plaintiff's only basis for jurisdiction is 28 U.S.C. §1257. As discussed above, the dismissal of the plaintiff's complaint was based solely on New York law. Under 28 U.S.C. §1257, there is no basis for review of determinations based purely on state law. *International Longshoreman's Association, AFL-CIO v. Davis,* 106 S.Ct. 1904 (1986). Similarly, under 28 U.S.C.

§1257, there is no basis for review of this matter because the federal statutes were not considered by the appellate courts.

Nor is there any potential conflict between the ruling of the New York courts in this action and prior or future interpretations of the federal statutes involved by other courts. The plaintiff's complaint was dismissed, pursuant to New York law, because the plaintiff failed to establish a *prima facie* case of medical malpractice. The decision in this action is based on independent and adequate state grounds that do not implicate the application or interpretation of the federal statutes involved. Thus, the Supreme Court lacks jurisdiction to review this matter.

4. The Plaintiff's Federal Law Claims Lack Merit.

There is no merit to the plaintiff's federal claims based on the Emergency Medical Treatment and Labor Act, 42 U.S.C. §1395dd; the Rehabilitation Act of 1973, 29 U.S.C. §794; or the Americans with Disabilities Acts, 42 U.S.C. §12101.

The EMTALA is designed to prevent hospitals participating in the Medicare program from refusing to treat a patient with an emergency medical condition or from transferring the patient before the patient is stabilized based on the patient's lack of insurance coverage or the patient's inability to pay for medical expenses. *Correa v. Hospital San Francisco,* 69 F.3d 1184, 1189 (1st Cir. 1995), cert denied 116 S.Ct. 1423 (1996). In the instant action, the plaintiff's decedent received emergency medical treatment on September 10, 1989. Thereafter, she was admitted and remained a patient for almost two years. The EMTALA does not apply because this action does not involve emergency medical treatment.

Moreover, even if EMTALA were to apply, the plaintiff voluntarily withdrew any claims other than for the medical care in the time period from August 27, 1991 to September 4, 1991. Thus, the emergency medical treatment on September 10, 1989 is no longer at issue. The EMTALA simply does not apply in this action.

The Rehabilitation Act of 1973 expressly states that a handicapped individual shall not be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program receiving Federal assistance . . ." 29 U.S.C. §794. In the instant action, the plaintiff failed to prove any discrimination against the plaintiff's decedent. Thus, the Rehabilitation Act of 1973 does not apply.

The purpose of the Americans with Disabilities Act is to prevent discrimination against individuals with disabilities. 42 U.S.C. §12101(b). In the instant action, the plaintiff failed to prove any discrimination against the plaintiff's decedent. Thus, the ADA does not apply.

In sum, even if the federal claims were considered, the plaintiff's allegations lack merit.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the plaintiff's petition for a writ of certiorari should be denied.

Respectfully submitted,

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